May 31, 2016

BY ELECTRONIC AND FIRST CLASS MAIL

Kathryn Roberts
Director
Resource Protection Division
New Mexico Environment Department
P.O Box 5469
Santa Fe, New Mexico 87502-5469

Re: Draft Consent Order

Dear Ms. Roberts:

This letter is to provide you with the comments of Conservation Voters New Mexico (Conservation Voters) on the draft consent order between the New Mexico Environment Department and the United States Department of Energy (DOE) dated March 31, 2016. The Environment Department proposes that DOE would continue the cleanup of environmental contamination at Los Alamos National Laboratory (Laboratory) under the terms of the draft consent order. Conservation Voters appreciates the opportunity to submit these comments. However, Conservation Voters has serious concerns with the draft consent order, and we strongly oppose its adoption in its current form.

CONSERVATION VOTERS NEW MEXICO

Conservation Voters is a non-profit organization that strives to enable the people of New Mexico to exercise their political power to protect our air, land, water, and wildlife so they can enjoy a cleaner and healthier environment. We are dedicated to ensuring democratic accountability and access for all New Mexicans to participate in the political process. We support policies and actions that promote long-term ecological and economic sustainability. And we support transparency in all government activities and decisions.

BACKGROUND

The draft consent order would replace the Compliance Order on Consent issued by the Environment Department to DOE and The Regents of the University of California (UC), the

DOE contractor that operated the Laboratory, on March 1, 2005 (2005 Consent Order). The March 2005 Consent Order, which is still in effect, requires DOE and UC (now Los Alamos National Security LLC, or LANS, the current DOE contractor that operates the Laboratory) to conduct the comprehensive investigation and cleanup of environmental contamination at the Laboratory. The 2005 Consent Order was revised twice, on June 18, 2008 and on October 29, 2012.

Prior to implementation of the 2005 Consent Order, DOE and its contractors made woefully little progress in cleanup of the Laboratory. Investigation and cleanup efforts were piecemeal, uncoordinated, sporadic, protracted, underfunded, and ineffective. According to former Environment Department employees, one of the goals of the 2005 Consent Order was to force DOE to fund investigation and cleanup sufficiently and comprehensively. DOE and its contractors would face stiff penalties if they did not do so.

Consequently, the Environment Department, on May 2, 2002, made a determination that conditions at the Laboratory posed an imminent and substantial endangerment to health and the environment under the New Mexico Hazardous Waste Act (HWA), NMSA 1978, § 74-4-13. The Environment Department, also on that date, issued a unilateral cleanup order in draft form for public comment. On November 26, 2002, the Environment Department issued the final unilateral order to DOE and UC. DOE and UC responded by promptly suing the Environment Department in State and federal court. It then took nearly two years, under two administrations (Governors Johnson and Richardson) to negotiate and approve the 2005 Consent Order. The 2005 Consent Order was signed, not only by the Environment Department, DOE, and UC, but also by the New Mexico Attorney General (for purposes of the Covenant Not to Sue and Reservation of Rights provisions). The 2005 Consent Order is very similar, in all its major provisions, to the original November 2002 unilateral order.

With the 2005 Consent Order in place, DOE and its contractor began investigation and cleanup in earnest. From 2005 through about 2010, DOE and its contractors, under close Environment Department oversight, accomplished a tremendous amount of work towards cleanup of the Laboratory. Most of investigation work was completed. A large plume of hexavalent chromium was discovered in groundwater migrating into Mortandad Canyon. Remedies were completed at dozens of individual sites. In 2011 and 2012, however, as the Martinez Administration "realigned" its priorities, and granted extension after extension of 2005 Consent Order deadlines – more than 150 extensions in all – cleanup efforts at the Laboratory slowed markedly. Little has been accomplished in the last three of four years. We fear that the draft consent order, if adopted, would continue that downward trend. The Environment Department would give up all the legal leverage it has over DOE and its contractors, and return to the paradigm of protracted, ineffective cleanup. That would be a huge loss for the people of New Mexico, and for their environment.

Further, under the draft consent order, if adopted, the State of New Mexico would forego collecting potentially millions of dollars in civil penalties owed by DOE and its contractor for

violating the 2005 Consent Order. The State would forego collecting these penalties at a time of severe revenue shortfalls. Yet, under the draft consent order, the Environment Department gets nothing in return for foregoing collection of these penalties. The Environment Department only makes further concessions.

SPECIFIC COMMENTS

Conservation Voters' specific comments follow.

1. *Uncollected Civil Penalties*

Under the draft consent order, the Environment Department would forgive DOE and its contractor for potentially millions of dollars in civil penalties owed to the State for violations of deadlines in the 2005 Consent Order. And the State would get nothing in return.

The 2005 Consent Order, in section XII, established dozens of deadlines for the completion of myriad corrective action tasks required by the Order, including completion of investigations at individual sites, installation of groundwater monitoring wells, submittal of groundwater monitoring reports, evaluation of remedial alternatives for individual sites, and completion of final remedies. These deadlines are enforceable, and many are subject to stipulated penalties, under section III.G, if not met. Alternatively, under section III.G.7, the Environment Department can seek civil penalties for missed deadlines in an enforcement action. Although the Environment Department granted DOE and LANS more than 150 extensions of these deadlines, by 2014 the Department began denying extension requests. Consequently, DOE and LANS are liable for potentially millions of dollars in penalties for violation of the 2005 Consent Order.

But the draft consent order would forgive these violations, with DOE and LANS paying no penalties at all. Rather inconspicuously, section II.A of the draft consent order states that it "settles any outstanding alleged violations under the 2005 Consent Order." And the State gets nothing in return for this concession. Forgiving DOE and LANS for potentially millions of dollars owed to the State for repeated violations of the 2005 Consent Order is bad public policy especially given the State's current budgetary shortfalls. Penalties for these violations should be assessed and collected in accordance with the 2005 Consent Order and the Environment Department's civil penalty policy.

2. *Unlawful Extension of Final Compliance Date*

The draft consent order would effectively and indefinitely extend the final compliance date for completing corrective action at the Laboratory, without the opportunity for a public hearing with formal testimony and cross-examination of witnesses. This outcome would be contrary to the 2005 Consent Order and, more importantly, contrary to the HWA. It would thus be unlawful, and it would also be bad public policy.

The legal requirements that mandate a public hearing are complex, but they are nevertheless clear. We begin with the 2005 Consent Order. Section XII of the 2005 Consent Order establishes the compliance schedule for implementation and completion of the corrective action at the Laboratory. This schedule is mandatory. The opening paragraph of section XII states that DOE and UC (now LANS) "shall" follow the specified compliance schedules for all of the corrective action tasks included in the order. The word "shall," of course, denotes a mandatory requirement. Tables XII-2 and XII-3 of section XII establish the compliance schedules for the submission of the work plans, reports, and other items that must be submitted to the Environment Department for review and approval. And the final report that is to be submitted under the 2005 Consent Order – the final compliance date – is the remedy completion report for MDA G. Tables XII-2 and XII-3 required it to be submitted by December 6, 2015, more than five months ago. The draft consent order would, ostensibly, extend this final compliance date indefinitely.

Next, we move to the federal regulations that govern the procedures – including public participation procedures – for modifying permits issued to hazardous waste facilities such as the Laboratory. These regulations have been adopted by the New Mexico Environmental Improvement Board, and incorporated by reference into the New Mexico Hazardous Waste Management Regulations. These regulations require a "Class 3" permit modification for an extension of a final compliance date. 40 C.F.R. § 270.42, Appendix 1 A.5.b, incorporated by 20.4.1.900 NMAC. Thus, if it were a permit requirement rather than a 2005 Consent Order requirement, any extension of the deadline for submission of the remedy completion report for MDA G would be a Class 3 permit modification. More on this later.

Next we must ask, what is a Class 3 permit modification? Under the federal regulations, adopted by New Mexico, a Class 3 permit modification is one that requires the highest level of public participation. It can be made only after a minimum of a 60-day public comment period and the opportunity for a public meeting. 40 C.F.R § 270.42(c), incorporated by 20.4.1.900 NMAC.

But the HWA takes it one step further. The HWA requires that prior to the issuance of a "major modification" to a permit, the Environment Department must afford "an opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing." NMSA 1978, § 74-4-4.2(H) (2006). The difference in terminology is worth noting: Is a major modification synonymous with a "Class 3 modification"? The New Mexico regulations answer this question in the affirmative. They clarify that a "major modification" under the HWA is the same thing as a "Class 3 modification" under the federal regulations. 20.4.1.901.B(6) NMAC. Thus, at least in New Mexico, a Class 3 permit modification can be accomplished only after affording the opportunity for an evidentiary hearing, with formal testimony and cross-examination of witnesses.

Now, finally, we come to the crux of the matter. The final compliance date that the Environment Department purports to extend – the deadline for submitting a remedy completion report for MDA G – is not a permit modification at all. It is a modification to the 2005 Consent Order. The federal regulations apply to permits because corrective action is in most cases (though not always) conducted under a hazardous waste facility permit. But the drafters of the 2005 Consent Order apparently recognized this regulatory gap, and they filled it. Section III.W.5 of the 2005 Consent Order explicitly provides for the preservation of full procedural rights for the public:

> This Consent Order hereby incorporates all rights, procedures and other protections afforded the Respondents [DOE and UC, now LANS] and the public pursuant to the regulations at 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42) and 20.4.1.901 NMAC, including, but not limited to, opportunities for public participation, including public notice and comment, administrative hearings, and judicial appeals concerning, for example, remedy selection decisions of the [Environment] Department.

Thus, extension of a final compliance date under the 2005 Consent Order can be done only after the opportunity for a public hearing including formal testimony and cross-examination. The Environment Department is bound by law to follow these procedural requirements.

3. *Elimination of Enforceable Deadlines*

The draft consent order would eliminate all the deadlines for completing corrective action tasks under the 2005 Consent Order, and replace them with an indefinite and opaque negotiating process. There would be no opportunity for the public to participate in setting the schedule.

The 2005 Consent Order, in section XII, established dozens of deadlines for the completion of corrective action tasks required by the Order. These deadlines are enforceable, and many are subject to stipulated penalties (or enforcement action), under section III.G, if not met. This schedule, combined with stipulated penalties if it was not met, was very successful in prompting DOE to request and Congress to appropriate adequate cleanup funds. Until 2011 or 2012, when the Environment Department began summarily granting deadline extensions, these provisions of the 2005 Consent Order had been very effective in compelling DOE and its contractors to move forward with investigation and cleanup.

The draft consent order would abandon these provisions and replace them with a so-called "campaign approach," expressly adopting this Orwellian DOE term, under section VIII. Under section VIII.A.3, it would be up to DOE, not the Environment Department, to select the timing and scope of each "campaign." The draft consent order contains no deadlines. Rather, under section VIII.B and C, each year DOE and the Environment Department would negotiate a schedule of 10 to 20 "milestone" deadlines for the next federal fiscal year. These milestones would be enforceable and subject to stipulated penalties. Additional "target" deadlines would also be negotiated for the second following fiscal year, but these targets would not be

enforceable. Under section VIII.C, the milestones for any fiscal year would be determined in large part by appropriated funding.

Thus, the corrective action deadlines in the 2005 Consent Order would be extended indefinitely, with no final cleanup deadline. Enforceable deadlines for cleanup tasks would apply no more than one year into the future. These deadlines would be based DOE's chosen "campaign." Those deadlines would be negotiated each year, with DOE having the advantage. Negotiation of the annual schedule would take place behind closed doors, with no public participation, and no opportunity for the public even to comment on the schedule. And the annual schedule would be driven by DOE funding, rather than the schedule driving the funding – the approach of the 2005 Consent Order.

Moreover, the Environment Department would have very little leverage in the annual negotiations. Significantly, despite the many deadline extensions that the Environment Department granted to DOE and LANS, by 2014 the Department began denying extension requests. Consequently, DOE and LANS are liable for potentially millions of dollars in stipulated penalties under the 2005 Consent Order. But under section II.A of the draft consent order, the order would "settle any outstanding violations of the 2005 Consent Order." Thus, under the draft consent order, the Environment Department would give away all its bargaining power – i.e., its claim for penalties – and get essentially nothing in return. Without a schedule the order is unenforceable. Only later would a limited (one-year) schedule be negotiated, with the Environment Department having no cards left to play. This would be a wonderful deal for DOE. It would amount to an effective abdication by the Environment Department of its authority and its responsibility as a regulatory agency.

4. *Weakening of Enforceability*

In addition to eliminating most of the cleanup deadlines in the draft order would substantially weaken the enforceability of the few deadlines that would remain for annual negotiation. It would do so primarily in two provisions.

The first of these provisions is section XXVIII of the draft consent order, which allows DOE and LANS to request extensions of time on deadlines in the schedule. Such a provision is appropriate; the 2005 Consent Order has somewhat similar provision, in section III.J.2. The draft consent order provision properly would require DOE and LANS to make a showing of good cause before the Environment Department would grant an extension (as does the 2005 provision). A showing of good cause should be made on a case-by-case basis, depending on the circumstances that give rise to the extension request. But the draft consent order would change this approach. It contains a laundry list of "examples" of good cause that presumably – and DOE would no doubt argue – would automatically constitute good cause, regardless of the circumstances. Thus, for example, one item on the list is "unanticipated breakage or accident to machinery, equipment, or lines of pipe." Under some circumstances, such an accident might

constitute good cause. If, however, DOE or its contractor had negligently failed to properly maintain the machinery or pipeline, it would not be good cause.

The second provision is the force majeure provision in section XXXII of the draft consent order. It contains a standard definition of force majeure as any event arising from causes beyond the control of DOE or its respective agents, contractors, or employees that causes a delay in or prevents the performance of any obligations of DOE under the consent order. And it includes a list of examples of force majeure. The 2005 Consent Order contained a similar force majeure provision in section III.H. But, unlike the 2005 Consent Order, the draft consent order does not specify that an example on the list is a force majeure only if it meets the definition of force majeure. Thus, as with the deadline extension provision, an item on the list is presumably (and arguably) a force majeure regardless of the circumstances.

These two provisions will make it more difficult to enforce the consent order should it be adopted. Yet there is no justification for the Environment Department to agree to weaken these important provisions.

5. *Weakening of Cleanup Standards*

The draft consent order also appears to weaken the cleanup standards specified in the 2005 Consent Order. For example, the draft consent order seems to provide in section IX.F that tap water screening levels would apply only if the water has a present or reasonably foreseeable future use as drinking water. This is not a concept found in the HWA, or RCRA, but is taken from the New Mexico Water Quality Act. It was not included anywhere in the 2005 Consent Order. It should not be an issue at the Laboratory, because all the groundwater underlying the Pajarito Plateau is a potential source of drinking water. But DOE, no doubt, under certain circumstances, make an issue of it. And it can be very controversial. The Environment Department, under the two previous administrations, spent some ten years litigating the issue over the Tyrone mine in Grant County. There is no reason that the Environment Department should concede in any way this issue here.

The provision on cleanup standards is in other places poorly written and not comprehensible. It should not be adopted.

6. *Limit on Public Participation Procedures*

The draft consent order would also expressly limit public participation requirements in a way that is a complete divergence from the 2005 Consent Order. As explained under Comment #2 above, the 2005 Consent Order explicitly protects certain procedural rights available to the public:

> This Consent Order hereby incorporates all rights, procedures and other protections afforded the Respondents [DOE and UC, now LANS] and the public pursuant to the regulations at

> 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42) and 20.4.1.901 NMAC, including, but not limited to, opportunities for public participation, including public notice and comment, administrative hearings, and judicial appeals concerning, for example, remedy selection decisions of the [Environment] Department.

The draft consent order would take the opposite tack:

> The Parties agree that the rights, procedures and other protections set forth at 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42), 20.4.1.901 NMAC, and 20.4.1.902 NMAC, including, but not limited to, opportunities for public participation, including public notice and comment, administrative hearings, and judicial appeals, do not apply to modification of the Consent Order itself.

Thus, any modification to the draft consent order that would constitute a "Class 3" permit modification (discussed in Comment #2) if corrective action had been required under a permit would not be subject to an opportunity for a public hearing. This "end run" around the requirements of the HWA, NMSA 1978, § 74-4-4.2(H), would be a stark and troubling departure from the 2005 Consent Order.

7. *Failure to Obtain Attorney General Approval*

The 2005 Consent Order was signed by the Attorney General of New Mexico for purposes of the Covenant Not to Sue (section III.S) and the Reservation of Rights (section III.T). The draft consent order would not be signed by the Attorney General, as drafted. Yet, in section XXXIV, it would provide DOE with a covenant not to sue on behalf of the State of New Mexico, not merely on behalf of the Environment Department.

More importantly, the draft consent order would substantially expand the breadth of the covenant not to sue beyond that in the 2005 Consent Order, which it would replace. The covenant not to sue covers "matters within the scope of this Consent Order." One matter that is within the scope of the draft consent order is the State's claim for penalties for the many violations of the 2005 Consent Order (discussed in Comment #1 above). These penalties could run into the millions of dollars. This claim for penalties would be settled under section II.A of the draft consent order – without any penalty payment at all – and DOE would receive a covenant not to sue for the claim under section XXXIV. Yet the Attorney General is not given the opportunity to approve or disapprove this arrangement.

Further, the covenant not to sue in the draft consent order is given "in consideration for the actions that will be performed by DOE under the terms of this Consent Order." The "consideration" that the Environment Department – and indeed, the State of New Mexico – would get under this draft consent order is much less than the consideration that the Environment Department and the State got under the 2005 Consent Order. The 2005 Consent Order, as discussed above, required DOE and its contractor to implement corrective action, according to a

definite and specified schedule, to completion. The draft consent order would provide merely that a schedule will be negotiated at some points in the future. Yet, again, the Attorney General is not given the opportunity to approve or disapprove this deal.

The Attorney General needs to be consulted on the draft consent order and given the opportunity to approve – or, we would hope, disapprove – the document as drafted.

8. *Dismissal of LANS as a Party Respondent*

Oddly, the draft consent order would impose obligations only DOE, not on its contractor, LANS. It may be that DOE intends drop LANS as its primary contractor. But until that happens, LANS remains the operator of the Laboratory facility, and is liable for corrective action under the HWA and the federal Resource Conservation and Recovery Act. Moreover, if a new contractor is retained, that contractor would be obligated to comply with the order as the successor to LANS. Such a succession occurred under the 2005 Consent Order, as the contractor's obligations automatically passed from UC to LANS.

9. *Specific Requirements*

Lastly, the 2005 Consent Order includes numerous specific requirements for such things as well installation, sample collection, and preparation of work plans and reports. DOE chaffed at these requirements, but they ensured that the work was done properly, consistently, and according to standard industry practices. They also ensured that work plans and reports were consistent, easy for the Environment Department to review, and easy for the public to understand. The draft consent order would omit any such requirements. It would not even require the preparation of work plans for proposed cleanup activities. DOE no doubt will take advantage of these omissions, and as a consequence, the cleanup will be much more difficult for the Environment Department to oversee.

We see many, many other problems with the draft consent order. But we are focusing only on some of the most serious issues in these comments. Overall, the draft consent order would be a very good deal for DOE and its contractor. It would be a very bad deal for the State of New Mexico.

We urge the Environment Department to abandon the draft consent order. It is fraught with serious problems, and represents a big step backwards in achieving the goal of cleanup of the Laboratory. Instead, the Environment Department should retain the current 2005 Consent Order and, using the threat of penalties as leverage, negotiate a revised cleanup schedule – one that is strict yet reasonable, and one that includes a final completion date. The public should be given an opportunity for an evidentiary hearing on the revised schedule with the new completion date, in accordance with the HWA and the 2005 Consent Order.

Sincerely,

Ben Shelton
Political Director

New Mexico Attorney General Hector Balderas
The Honorable Tom Udall, United States Senate
The Honorable Martin Heinrich, United States Senate
The Honorable Ben Ray Lujan, United States House of Representatives
Ron Curry, Regional Administrator, EPA Region 6